

CRIMINAL PROCEDURE
Indiana Judicial Conference
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FOLLOW-UP ON 2009 OPINIONS

Whatley v. State, 928 N.E.2d 202 (Ind. Sup. Ct. 6/8/10)

- Issue: Is Robinson Community Church a “youth program center” so as to enhance the Defendant’s Possession of Cocaine charge to a Class A Felony?
- In 2009, the Court of Appeals reversed Whatley’s Class A Felony conviction, concluding that the principal identity of Robinson Community Church was as a church and that the identity of that facility did not change by reason of its incidental and auxiliary faith-based activities for young people.
- The Supreme Court rejected Whatley’s argument that the statute that enhances drug offenses due to a person’s presence within 1000 feet of a youth program center was unconstitutionally vague as to Whatley. The Supreme Court concluded that Whatley could have objectively discovered the church’s status as a youth program center by observing young people entering and exiting the building on a regular basis and/or by contacting the church to inquire whether youth programs were offered there on a regular basis.
- The Supreme Court further concluded that neither the religious content of the programs offered nor other uses of the building were relevant in determining whether Robinson Community Church met the statutory definition of a “youth program center.”
- The Supreme Court held that the jury could have properly concluded that Robinson Community Church was a “youth program center” because it provided a building or structure that on a regular basis offered recreational, social, or other programs or services for persons less than eighteen years of age.
- The Court of Appeals’ opinion was reversed, and Whatley’s Class A Felony conviction and sentence were affirmed.

Griffin v. State, 925 N.E.2d 344 (Ind. Sup. Ct. 2/23/10)

- Issue on appeal: Was sufficient evidence presented to support Griffin’s Class B Felony Possession of Cocaine Within 1000 Feet of School Property conviction upon the Defendant’s presentation of the statutory defense that he was only “briefly” near the school property and that no children were present at the time?
- The drug offense enhancement statute provides for a defense to the enhancement of the drug crime charged when a defendant’s presence within 1000 feet of school property, a youth program center, a family housing project, or a public park:
 - is “brief”; and
 - no person under eighteen at least three years the junior of the person charged was in, on, or within 1000 feet of the designated area at the time.
- This defense constitutes a mitigating factor that reduces culpability. A defendant, therefore, does not have the burden of proving this defense but only the burden of placing the issue in question when the State’s evidence has not already done so.

- Once at issue, the State must rebut the defense by proving beyond a reasonable doubt either that the defendant was within 1000 feet of the drug free zone more than briefly, or that persons under the age of eighteen, at least three years the junior of the person charged, were within 1000 feet of that drug free zone at the time.
- The Court of Appeals concluded that a law enforcement officer's observation of Griffin for approximately five minutes as he walked down Campeau Street was sufficient to show that Griffin was more than "briefly" within 1000 feet of school property, and concluded that the State's evidence was sufficient to rebut Griffin's defense.
 - The Supreme Court disagreed.
 - The term "briefly" is not defined by statute and is not without ambiguity. In that the legislature did not choose to specify a period of time to define "briefly" within the drug enhancement statute, the Supreme Court instructed that such duration must be determined in relation to other considerations, not merely an abstract, temporal component.
 - The Supreme Court noted that the purpose of the defense to the enhancement statute is to excuse a defendant from the required enhancement when his presence in the proscribed zone only minimally increases the risk to children. The interpretation of the term "briefly" should, therefore, be interpreted in a manner consistent with this purpose, the Supreme Court said.
 - In the Supreme Court's opinion, when a defendant's presence in a proscribed zone is primarily for a purpose other than illicit drug activity, the risk to children is smaller and the word briefly could encompass a greater duration of time than would otherwise be tolerated. When a defendant's principal purpose of presence is to actively engage in criminal drug activity, especially if visible to any children, even a relatively short intrusion would be more than "brief" and not excuse a defendant from enhancement of the drug crime charged.
 - In the present case, the Supreme Court concluded that the evidence presented was sufficient to raise the defense, and the State's evidence was insufficient to rebut that defense beyond a reasonable doubt.
 - The State failed to prove that Griffin's presence within 1000 feet of a school lasted any longer than reasonably necessary for him to push his moped down the street. Nor did the State prove the presence of any person under the age of eighteen within 1000 feet of the school property at the time of the charged offense.
 - Griffin's Class B Felony Possession of Cocaine conviction was reversed and the case remanded for entry of conviction as a Class D Felony.

Gallagher v. State, 925 N.E.2d 344 (Ind. Sup. Ct. 2/23/10)

- Issue: Was the State's evidence sufficient to defeat Gallagher's defense that he was within 1000 feet of school property only briefly and that there were no children under the age of eighteen, at least three years his junior, within 1000 feet of that property at the time?

- The State did not dispute the absence of children, so the only issue on appeal was whether Gallagher was within 1000 feet of St. John's Lutheran School more than "briefly."
- Gallagher was within 1000 feet of the school for as little as thirteen minutes and thirty seconds. But, during that period of time he was principally engaged in conduct related to unlawful drug activity.
- The Court of Appeals reversed Gallagher's Class A Felony conviction and ordered the trial court to re-sentence the Defendant within the sentencing range of a Class B Felony.
- The Supreme Court concluded that the evidence presented was sufficient to rebut the Defendant's claim that he was only briefly in the proscribed zone.
- The Supreme Court also rejected the Defendant's alternative argument that he was only within 1000 feet of school property at the request of law enforcement.
- The Supreme Court reversed the Court of Appeals and affirmed the Defendant's Class A Felony conviction.

King v. State, 921 N.E.2d 1288 (Ind. Sup. Ct. 3/2/10)

- Transfer was granted in this case to resolve a conflict in decisions of the Court of Appeals on the issue of whether the offense of Attempted Dissemination of Matter Harmful to Minors can be committed when a defendant attempts to disseminate proscribed matter by the Internet to an adult police detective posing as a minor.
- King was convicted on two counts of Child Solicitation and one count of Attempted Dissemination of Matter Harmful to Minors.
- On June 30, 2009, the Court of Appeals affirmed King's Attempted Dissemination conviction. King argued on appeal that the State's evidence was insufficient to convict him of Attempted Dissemination because the offensive matter he sent was received not by a minor but by an adult police officer.
- Another panel of the Court of Appeals on December 31, 2008, had reversed the Attempted Dissemination of Matter Harmful to Minors conviction of Randy Gibbs after he made the same argument made by King in the present case. Transfer was denied in Gibbs's case.
- The Supreme Court held in *King* that the unambiguous language of the dissemination statute clearly requires that, for the commission of the completed offense, harmful matter must in fact be distributed to a child less than eighteen years of age. The Court did not agree, however, that this manifests a legislative intent to foreclose application of the general attempt statute to prosecute unsuccessful attempts to commit the crime of Dissemination of Matter Harmful to Minors.
- In the present case, King attempted to disseminate matter harmful to minors to a person he believed or intended to be a child less than eighteen years of age. The only element of the offense of Dissemination of Matter Harmful to Minors not met in King's case was that the recipient was not in fact a child less than eighteen years of age. It was because the recipient was not a minor, that the Defendant was charged with Attempted Dissemination, rather than Dissemination of Matter Harmful to Minors.

- The Supreme Court held that the general attempt statute applies to the offense of Dissemination of Matter Harmful to Minors and that the commission of attempt dissemination is not precluded when the intended minor recipient is actually an adult.
- The judgment of the trial court was affirmed.
- The Supreme Court further held that to the extent the *Gibbs* opinion may be read to prohibit a conviction for Attempted Dissemination of Matter Harmful to Minors when the supposed minor was in fact an adult, that opinion was disapproved and overruled.

Beldon v. State, 926 N.E.2d 980 (Ind. Sup. Ct. 5/5/10)

- The Court of Appeals decided in May 2009, that the State could not charge a person with Operating a Vehicle While Intoxicated as a Class D Felony, based upon a prior Operating While Intoxicated conviction, and then use the same prior conviction as a predicate offense to support a finding that the person charged was an Habitual Substance Offender.
- The Supreme Court granted transfer and held that the Habitual Substance Offender statute provides legislative direction to authorize an underlying elevated conviction to be enhanced by the specialized habitual substance offender enhancement and that the Court of Appeals was mistaken to hold otherwise.
- Beldon also argued that the requirement of the Habitual Substance Offender statute that the predicate substance offense convictions must be unrelated to the instant offense precluded the Court's finding that he was an habitual substance offender.
- The Supreme Court rejected this argument as well.
- The Supreme Court reversed the Court of Appeals and affirmed the trial court's judgment.

FOLLOW-UP ON *MELLENDEZ-DIAZ v. MASSACHUSETTS* (2009)

Melendez-Diaz v. Massachusetts, 129 U.S. Sup. Ct. 2527 (2009)

- In *Melendez-Diaz*, the United States Supreme Court revisited *Crawford v. Washington* and elaborated upon the meaning of the word "testimonial" within the realm of forensic chemical testing.
- At trial in *Melendez-Diaz*, the State introduced three certificates of analysis indicating that the substance seized from the Defendant was cocaine of a certain weight.
- The certificates admitted in evidence were sworn to by a state laboratory analyst before a notary public. The analyst did not testify.
- A divided United States Supreme Court held that the admission of the lab certificates in *Melendez-Diaz's* case violated the Defendant's confrontational rights. The Supreme Court held that the certificates were quite plainly affidavits, and that they were admitted to prove that the substance found in the Defendant's possession was cocaine. Further, the Court concluded, the certificates were made

under circumstances which would lead an objective witness reasonably to believe that the statements therein would be available for use at a later trial.

Pendergrass v. State, 913 N.E.2d 703 (Ind. Sup. Ct. 9/24/09), *cert. denied* (6/14/10)

- Pendergrass was charged with child molest after he allegedly impregnated his thirteen-year-old daughter.
- The daughter aborted the fetus and at trial, two witnesses testified concerning DNA evidence that demonstrated the likelihood that Pendergrass was the father of that aborted fetus.
- These documents were admitted during the testimony of an Indiana State Police laboratory supervisor who explained the process of test sampling for DNA, and a DNA expert who performed the paternity analysis on the samples collected.
- Pendergrass objected to the admission of these documents arguing on hearsay and Confrontation Clause grounds that the State must call the analyst who actually performed the tests in the lab as a witness at trial. The trial court admitted the exhibits over the Defendant's objection.
- One of the exhibits admitted while the supervisor was testifying was a Certificate of Analysis performed by an analyst other than the supervisor. That exhibit contained no tests results or conclusions. A second exhibit admitted during the supervisor's testimony was a table of the test results entitled a "Profiles for Paternity Analysis" again compiled by the analyst who did not testify.
- The supervisor testified that she did the technical review of the analyst's tests in the present case and that she confirmed the paperwork done by the analyst and provided to the DNA expert. The supervisor also described the steps the analyst would have taken to develop the profiles of each of the three samples analyzed.
- The third exhibit was admitted during the DNA expert's testimony. He used the index created to calculate the probability that Pendergrass was the father of the aborted fetus.
- *Crawford v. Washington* held that where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation.
- Although *Crawford* did not provide a full definition of what constitutes a testimonial statement; the Court did provide the following core classes of testimonial statements:
 - *ex parte* in court testimony or its functional equivalent;
 - extra-judicial statements contained in formalized testimonial material; and
 - statements made under circumstances which would lead an objective witness reasonably to believe the statement would be available for use at a later trial.
- In the present case, Pendergrass had the opportunity to confront two witnesses who were directly involved in the substantive analysis of the samples tested in his case.
- The supervisor was a competent witness as to any systematic problems in the testing laboratory and was effectively cross-examined on every step of the testing

process, extraction and comparison. The expert who testified gave his opinion that Pendergrass was the father of the fetus tested.

- Pendergrass challenged the State's calling only two witnesses arguing that the State did not call all the right witnesses or enough witnesses.
- The Supreme Court held that the State's calling of the supervisor with direct involvement in the lab's technical processes and the expert who concluded that Pendergrass fathered the aborted fetus did not violate the Defendant's Sixth Amendment rights.

Briscoe v. Virginia, 130 S. Ct. 1316 (U.S. Sup. Ct. 1/25/10)

- At issue in this appeal was whether Virginia statutory provisions that required the State to file with the Clerk of the Court at least seven days prior to hearing or trial any lab certificate of analysis the State intended to introduce at trial in lieu of calling a live witness to testify regarding the results violated a defendant's Sixth Amendment rights. The statute further specified that the accused had to be provided an opportunity to question the person who had performed the analysis or examination documented by the certificate of analysis as an adverse witness; and that if a Defendant failed to call the adverse witness, he waived any Sixth Amendment challenge.
- The United States Supreme Court held that the statutes in question adequately informed a criminal defendant of the consequences of his failure to exercise the right to have a forensic analyst present at trial for cross-examination.
- The Virginia statute in question clearly put a defendant on notice of the admissibility of the forensic analysis without the testimony of that witness at trial, the Supreme Court concluded.
- The Court further opined that the disputed statute clearly put a defendant on notice that he waived his right to confrontation upon his failure to utilize the provision of the statute
- The Supreme Court passed on the opportunity in the *Briscoe* case to further refine its guidance on the Confrontation Clause by issuing a one sentence opinion, "We vacate the judgment of the Supreme Court of Virginia and remand the case for further proceedings not inconsistent with the opinion in *Melendez-Diez v. Massachusetts*."

Lehman v. State, 926 N.E.2d 35 (Ind. Ct. App. 4/13/10), *reh'g denied* (6/16/10)

- The confidential informant involved in the purchase of controlled substances from the Defendant in this case died prior to the Defendant being charged with various drug offenses.
- It was Lehman's contention on appeal that the trial court erred in admitting the deceased CI's statements made during two drug transactions which were audio taped. The Defendant argued that the admission of the tapes violated his right to confront and cross-examine the informant as guaranteed by the Sixth Amendment.
- *Crawford v. Washington* held that a statement made by a declarant who does not testify at trial violates the Sixth Amendment if the statement is testimonial, and

the declarant is unavailable, and the defendant lacked a prior opportunity to cross-examine that declarant.

- The Court of Appeals in the present case concluded that the CI's statements made at the beginning and end of both admitted audio-tapes were "testimonial." Both were made with a view to use the statements prosecutorially and under circumstances that would lead an objective witness to reasonably believe that the statements given would be available for use at a later trial.
- Therefore, to be admissible, the informant had to testify at trial or had to have been available for cross-examination. Howard did not appear at trial and was not available for cross-examination.
- The Court of Appeals concluded, however, that the error committed in admitting the disputed tapes was harmless. Other evidence presented established that law enforcement officers set up a controlled buy between the Defendant and the CI, searched the informant, and followed him to the Defendant's residence. The CI was again searched upon his return to the location of the supervising police officers. A law enforcement officer also saw Lehman walk up to the informant's vehicle during one of the drug buys that formed the basis of the crimes with which Lehman was charged.

Bond v. State, 925 N.E.2d 773 (Ind. Ct. App. 4/21/10), *reh'g denied* (6/29/10)

- In this appeal, the Defendant alleged that the admission of expert fingerprint analysis violated his Sixth Amendment rights.
- The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. The Sixth Amendment bars admission of testimonial hearsay unless the declarant is unavailable to testify and the defendant has had a prior opportunity to cross-examine him.
- The Court of Appeals concluded that lab analysts who prepare reports for use in criminal prosecutions are witnesses for purposes of a defendant's Sixth Amendment confrontation right.
- The reports of the analyst were affidavits that fall within the core class of testimonial statements covered by the Confrontation Clause and a defendant's Sixth Amendment right is, therefore, violated when the defendant is not allowed to confront such a witness at trial. (The Court cited to *Melendez-Diez*.)
- *Melendez-Diez* does not require, however, that everyone who touched a piece of evidence be called as a witness at trial.
- The thrust of the Defendant's argument was that the State failed in his case to produce the verifying fingerprint examiner and that this failure violated his right to confrontation.
- The first witness called by the State testified to the processes used to develop the prints found on the car the Defendant was alleged to have stolen. The second witness testified to the results of her own fingerprint comparisons.
- The second witness acknowledged that there was one other examiner who analyzed the latent prints as part of the ACE-V protocol utilized in the testing lab. That examiner did not appear as a witness at trial.

- In that this verifier's results and/or conclusions were neither introduced at trial nor discussed by either of the witnesses who testified, the Court of Appeals held that no Sixth Amendment violation had occurred.

Ramirez v. State, 928 N.E.2d 214 (Ind. Ct. App. 5/28/10)

- At trial, the State introduced breath test results as well as a Certificate of Compliance verifying routine inspection of the breath test equipment upon which Ramirez was tested on the night of his arrest.
- The official who had inspected the breath test equipment and prepared the certificate did not testify at trial.
- The Defendant argued on appeal that the admission of the Certificate of Compliance violated his Sixth Amendment right to confrontation because he was unable to cross-examine the equipment certifier.
- The Court of Appeals held that the Certificate in dispute did not offend the Defendant's confrontation rights, as the inspection certificate was not testimonial evidence within the purview of *Crawford v. Washington*.
- The Court reiterated that such certificates are not prepared at a judicial proceeding or during police interrogation; are not sworn affidavits; and do not contain formalized testimonial materials. Although prepared for purposes of criminal litigation, the Court said, such certificates are removed from the direct investigation or direct proof of whether a particular defendant operated a vehicle while intoxicated.
- Such certifications, the Court of Appeals concluded, are not prepared in anticipation of litigation in any particular case or with respect to implicating any specific defendant.
- This is the first appellate court review of the question of whether breath test inspection certificates are testimonial and thereby subject to Confrontation Clause analysis since *Melendez-Diez*.
- The Court of Appeals found no reason that *Melendez-Diez* should be interpreted to disturb the appellate courts' earlier holdings on this issue. The Court continued to hold that breath test instrument certifications are non-testimonial.

PRE-TRIAL ISSUES

DISCOVERY

State v. Schmitt, 915 N.E.2d 520 (Ind. Ct. App. 10/28/09), *trans. denied* (1/14/10)
DISMISSAL OF CHARGES AS SANCTION FOR VIOLATION OF DISCOVERY ORDER

- The trial court dismissed criminal misdemeanor charges against Schmitt due to the State's failure to comply with Court-ordered discovery. The State appealed.
- It is a trial judge's responsibility to direct the trial in a manner that facilitates the ascertainment of truth, ensures fairness, and obtains economy of time and effort commensurate with the rights of society and the criminal defendant.

- If a remedial measure is warranted upon failure to comply with discovery, a continuance is usually the proper remedy.
- When the State's actions are deliberate and the conduct prevents a fair trial, however, a more extreme remedial measure, such as the exclusion of evidence may be employed.
- Dismissal of charges is also a sanction within the arsenal of the trial judge in dealing with the failure of the prosecution to afford the defense access to evidentiary materials as the Court has ordered.
- In determining whether dismissal is proper, a Court should consider whether the breach was intentional or in bad faith and whether a substantial prejudice resulted.
- From the record in the present case, it appeared to the Court of Appeals that the trial court had been dealing with similar discovery disputes between the State and Schmitt's counsel in more than just the present case.
- The Court of Appeals concluded that the State had been less than diligent in complying with the Court's discovery order in the present case, and that the State had been warned that failure to respond would be considered bad faith. Even with this admonishment, the State had not provided the requested documents to the Defendant as of the date the trial court dismissed the charges.
- The Court of Appeals found no clear error in the trial court's determination that dismissal of Schmitt's charges was the appropriate sanction.

Skinner v. State, 920 N.E.2d 263 (Ind. Ct. App. 1/28/10), *reh'g denied* (4/6/10)

COMPELLING DISCOVERY

- Prior to trial, the State added Wingler, an inmate at the Morgan County Jail, to its witness list. The State expected Wingler to testify that the Defendant made statements to Wingler while in jail contrary to Skinner's self-defense claim.
- The trial court permitted Skinner's trial counsel to withdraw at that point in that defense counsel had gained information materially adverse to the State's anticipated witness during the attorney's representation of Wingler.
- Through newly appointed counsel, Skinner sought to compel his prior counsel to provide evidence gained through the attorney's prior representation of Wingler that would be used to impeach Wingler.
- After an *in-camera* hearing with prior counsel, the trial court denied Skinner's request finding that no exception to the attorney-client privilege applied in the present circumstances, and Wingler had not waived his attorney-client privilege. This interlocutory appeal followed.
- The scope of discovery is governed by Indiana Trial Rule 26(B)(1), which provides in relevant part that discovery requests must include:
 - A sufficient designation of items sought (particularity);
 - The items requested must be material to the defense (relevance); and
 - If the particularity and materiality requirements are met, the trial court must grant the request unless there is a showing of "paramount interest" in non-disclosure.
- Ultimately, these factors involve a balancing test that includes evaluation of the relevance of the material, its availability from other sources, the burden of

compliance measured in terms of difficulty, and the nature and importance of any interests invaded.

- In the present case, the paramount interest in non-disclosure was the attorney-client privilege in that the information sought from prior counsel was acquired by him during his representation of Wingler.
- The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon a lawyer's being fully informed by his/her client.
- The Court of Appeals determined that while the information sought in the present case might be relevant and material to impeach Wingler, Skinner had access to other information that would also serve that purpose. Wingler had a criminal record including crimes of dishonesty. Wingler had made it clear that in exchange for his testimony he was asking for a guaranteed sentence modification.
- Based upon the relevance of the material sought, its availability from other sources, and the nature and importance of any interests invaded, the Court of Appeals concluded that the information sought was not discoverable due to the protection provided by the attorney-client privilege. The appellate court held that the trial court did not abuse its discretion in denying Skinner's request to compel discovery of the information sought.

State v. Durrett, 923 N.E.2d 449 (Ind. Ct. App. 3/12/10) ADEQUACY OF DISCOVERY RESPONSE

- The van driven by Durrett was towed and stored after the incident giving rise to the Defendant's arrest.
- Prior to charges being filed, the van was sold for scrap metal on January 13, 2005.
- Charges were not filed until February 14, 2005.
- Three years after the sale of the van, the Defendant filed a Motion for Physical Inspection asking the trial court's permission to inspect and photograph the earlier sold van. Defendant's motion was granted.
- In October, 2008, the Defendant filed a Motion to Compel Supplemental Discovery requesting that the trial court compel the State to provide current addresses for the State's listed witnesses.
- The State was permitted a specified period of time within which to provide the addresses sought and was subsequently granted an extension of time to provide some of those addresses. The Court also gave the State additional time to locate the van.
- The State was never able to locate the alleged victim of the crime charged and only able to provide photos of the van, not the van itself.
- At issue on appeal was whether the absence of the van, the absence of the alleged victim, Uphold, and the State's failure to provide discovery warranted dismissal.
- When determining whether a defendant's due process rights have been violated by the State's failure to preserve evidence, a court must first decide whether the evidence is potentially useful evidence or material exculpatory evidence.
- Evidence is **MATERIALLY EXCULPATORY** if it possesses an exculpatory value that was apparent before the evidence was destroyed and is of such a nature

- that the defendant would be unable to obtain comparable evidence by other reasonably available means. A prosecutor's duty to preserve exculpatory evidence is limited to evidence that might be expected to play a significant role in a defendant's defense. Failure to preserve materially exculpatory evidence violates due process regardless of whether the State acted in good or bad faith.
- Evidence is merely POTENTIALLY USEFUL if no more can be said than that it could have been subjected to tests the results of which might have exonerated the defendant. The State's failure to preserve potentially useful evidence does not constitute a violation of due process rights unless the defendant shows bad faith on the part of the police.
 - The Court of Appeals in the present case found that the photos of the van produced provided comparable evidence to the production of the actual van and that the State had no duty to preserve the van as evidence.
 - Because the State could not locate Uphold she was not called as a witness against the Defendant. Therefore, the right to confrontation with regard to Uphold was not implicated.
 - Dismissal of charges is a sanction within the arsenal of the trial judge if the State fails to afford the defense access to evidentiary materials as ordered.
 - In determining whether dismissal was proper in this case, the Court of Appeals considered whether the State's breach was intentional or in bad faith and whether substantial prejudice resulted.
 - The trial court found that the cumulative effect of the absence of the van, the witness and one of the officers involved in the investigation of the case denied Durrett her fundamental right to due process and her right to confront her accusers.
 - The Court of Appeals found no evidence of bad faith in the State's failure to preserve the van; no denial of Durrett's right to confrontation due to the absence of a witness; and no evidence of bad faith in the State's failure to provide the discovery sought.
 - Accordingly, the Court of Appeals concluded that the trial court had abused its discretion in granting the Defendant's motion to dismiss.

In re Subpoena to Crisis Connection, Inc. State of Indiana v. Fromme _____ N.E.2d _____ (Ind. Ct. App. 7/15/10) (No.19A05-0910-CR602)

- After Fromme was charged with two counts of Child Molest, he served a subpoena *duces tecum* upon Crisis Connection seeking all records in its possession relating to his alleged victims and their mother.
- Crisis Connection, a nonprofit organization that provides counseling services to victims of domestic violence and sexual assault, appealed the trial court's order that it produce its records to the Court for an *in camera* review.
- The Court of Appeals concluded that an *in camera* review properly balanced Fromme's constitutional rights and the victims' interest in privacy. The Court of Appeals, therefore, affirmed the trial court's order.

ATTORNEY ISSUES

Shively v. State, 912 N.E.2d 427 (Ind. Ct. App. 9/2/09) APPOINTMENT OF A PUBLIC DEFENDER

- The sole challenge in this appeal was the trial court's denial of Shively's request for appointment of a public defender.
- A court does not have discretion to deny counsel to an indigent defendant.
- The duty to appoint competent counsel arises at any stage of the proceedings when a defendant's indigency causes him to be without the assistance of counsel.
- Failure to permit a defendant to have counsel amounts to denial of due process, and there can be no valid criminal trial unless a defendant is represented by counsel if he or she desires representation.
- There are no specific financial guidelines for determination of indigency.
- A defendant does not have to be totally without means in order to be entitled to counsel at public expense. The court may appoint counsel if a defendant cannot do so without imposing a substantial hardship on himself or his family.
- An indigency determination cannot be made on a superficial examination of income and ownership of property, but must be based upon as thorough an examination of the defendant's total financial picture as is practical.
- A defendant's ability to pay must include a balancing of assets against liabilities and a consideration of the amount of the defendant's disposable income or other resources reasonably available to him or her after payment of fixed or certain financial obligations.
- Because the right to counsel is a fundamental constitutional right, a court's record in each case must show that the court has given careful consideration to a Defendant's claimed indigency commensurate with the right of the defendant that is at stake.
- The Court of Appeals in this appeal could not conclude that the trial court gave the required careful consideration to Shively's financial situation in either of his pre-trial hearings. Only a rough estimate of current earnings was received at each of those hearings.
- Shively had substantial obligations to his children as was revealed during the Defendant's third indigency hearing, post trial. Thereafter, the trial court appointed counsel prior to the Defendant's sentencing hearing.
- The Court of Appeals reversed Shively's convictions due to the trial court's failure to appoint counsel pre-trial.

Hopper v. State, 926 N.E.2d 499 (Ind. Ct. App. 4/28/10) WAIVER OF COUNSEL PRIOR TO GUILTY PLEA

- Hopper appealed the post-conviction court's denial of his post-conviction relief petition. The sole issue on appeal was whether the Defendant knowingly and intelligently waived his right to counsel prior to pleading guilty.
- The Court of Appeals concluded that the requirement that a defendant be advised of the dangers of self-representation and the benefit of counsel applies with equal strength regardless of whether a *pro se* defendant is choosing to plead guilty or proceed to trial.

- Hopper was not advised of the disadvantages of self-representation, either at initial hearing or at his change of plea hearing.
- The advisement given at initial hearing that “if the case is serious enough” you have a right to counsel, was clearly a misrepresentation of the scope of the Defendant’s right to counsel.
- Appellate courts generally consider four factors in reviewing the adequacy of a waiver of counsel:
 - the extent of the court’s inquiry into a defendant’s decision;
 - other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation;
 - the background and experience of the defendant; and
 - the context of the defendant’s decision to proceed *pro se*.
- The Court of Appeals concluded in the present case that no meaningful inquiry had occurred so as to support a conclusion that Hopper waived his right to counsel knowingly and intelligently.
- Based upon Indiana Supreme Court precedent, the Court of Appeals found no need to inquire as to whether Hopper was prejudiced by the absence of counsel.
- The Court of Appeals held that the post-conviction court erred in concluding that Hopper knowingly and intelligently waived his right to counsel. The Court of Appeals reversed the post-conviction court’s denial of Hopper’s petition for post-conviction relief.

Shepherd v. State, 924 N.E.2d 1274 (Ind. Ct. App. 4/14/10) CONFLICT OF INTEREST

- Shepherd’s trial counsel also represented one of the State’s witnesses. That witness lived with the Defendant and was Shepherd’s girlfriend at the time Shepherd was alleged to have committed the instant offense. The witness was also the daughter of the State’s primary witness.
- In his petition for post-conviction relief, Shepherd asserted that his trial counsel was ineffective because of counsel’s representation of the Defendant’s girlfriend in an unrelated case.
- A criminal defendant’s Sixth Amendment right to effective assistance of counsel includes the right to conflict-free representation.
- To prevail on a claim of a conflict of interest, a defendant must demonstrate to the post-conviction court that trial counsel had an actual conflict of interest and that the conflict adversely affected counsel’s performance in the Defendant’s case.
- Once a defendant has demonstrated an actual conflict and an adverse effect on his lawyer’s performance, the prejudice prong of an ineffective assistance of counsel claim is presumed.
- An adverse effect on performance caused by counsel’s failure to act requires a showing of:
 - A plausible strategy or tactic that was not followed that might have been pursued; and
 - An inconsistency between that strategy or tactic and counsel’s other loyalties, or that the alternate strategy or tactic was not undertaken due to the conflict.

- The State conceded that there was an actual conflict of interest in the present case, but argued that Shepherd failed to show that trial counsel's performance had an adverse effect on counsel's performance.
- The Court of Appeals concluded that as to Defendant's Dealing in Cocaine conviction, trial counsel's assistance was not adversely affected in that a law enforcement officer personally witnessed Shepherd sell cocaine. Defendant's girlfriend's testimony regarding a conversation between the Defendant and her mother was, therefore, irrelevant.
- The Court of Appeals did not reach the same conclusion, however, as to Shepherd's Possession of Cocaine conviction in that the girlfriend's testimony directly related to the ownership of the cigarette package containing cocaine found in the vehicle that both his girlfriend and Shepherd had driven on the day in question.
- Because Shepherd established an actual conflict and an adverse effect on his lawyer's performance as to his Possession of Cocaine conviction, the prejudice prong of the ineffective assistance of counsel claim was presumed.
- Therefore, the Court of Appeals held that the post-conviction court's determination that Shepherd had received effective assistance of counsel in his Possession of Cocaine case was error, and Shepherd's Possession of Cocaine conviction was reversed.
- The case was remanded with instruction to vacate the possession conviction.

Lewis v. State, 929 N.E.2d 261 (Ind. Ct. App. 7/8/10) IAC-FILING OF TIMELY REQUEST FOR JURY TRIAL

- A trial court should not grant a demand for trial by jury in a misdemeanor case after the time fixed by Criminal Rule 22 has elapsed except upon the written agreement of the State and defendant, which agreement shall be filed with the court and made a part of the record. If an agreement is filed, the trial court may then, in its discretion, grant the jury trial request.
- The Chronological Case Summary in the present case indicated that Lewis told the trial court at his initial hearing that he wanted a jury trial.
- Thus, his later appointed counsel should have known the Defendant's preference for jury trial upon reviewing the CCS and should have pursued the matter further before the scheduled bench trial, the Court of Appeals concluded.
- The Court of Appeals found that the Defendant's attorney's failure to timely file a written request for jury trial fell below the range of professionally competent representation, and that the Defendant was prejudiced by counsel's failure.
- The Court of Appeals remanded the *Lewis* case to the trial court with instructions to vacate the Defendant's convictions and hold a new trial.

Padila v. Kentucky, 130 S. Ct. 1473 (U.S. Sup. Ct. 3/31/10) ADVISING DEFENDANT OF CONSEQUENCE OF DEPORTATION

- The United States Supreme Court held that where the relevant immigration statute is succinct, clear, and explicit in defining removal consequences such as the removal required for all controlled substance convictions except for the most

- trivial marijuana possession offenses, counsel's performance is deficient if he or she does not advise the defendant of the consequence of removal upon conviction.
- In *Segura v. State*, 749 N.E.2d 496 (Ind. Sup. Ct. 2001), the Indiana Supreme Court held that the consequence of deportation, whether labeled collateral or not, can under some circumstances constitute deficient performance of counsel.
 - Whether the failure to so advise is deficient in a given case is fact sensitive and turns on a number of factors including the lawyer's knowledge of his/her client's status as an alien, the client's familiarity with the consequences of conviction, the severity of the criminal penal consequences, and the likely subsequent effect of deportation.

WIRETAPS

State v. Haldeman & Lawson, 919 N.E.2d 539 (Ind. Sup. Ct. 1/15/10)

- At issue in this appeal was whether the State must comply with Indiana Rule of Criminal Procedure 25, which imposes a stay pending preliminary appellate review of a warrant authorizing interception of telephonic or telegraphic communications, notwithstanding the repeal of the statutory provision requiring such review.
- The Supreme Court held that the State was not authorized to disregard its obligation under the Criminal Rule which had not been repealed or modified. The Supreme Court, however, found the error harmless.
- The factual, procedural, and legal correctness of the warrants utilized in these cases were not challenged at trial or on appeal by either Defendant. Nor did either assert a basis upon which to claim that, if there had been an automatic review, the execution of the warrant would have been prevented, modified, or interrupted. Neither, therefore, demonstrated that his substantial rights had been affected.
- The Supreme Court reversed the trial court's orders granting the Defendants' motions to suppress. The cases were remanded for further proceedings.

INTERSTATE AGREEMENT ON DETAINERS ACT (IADA)

Bowling v. State, 918 N.E.2d 701 (Ind. Ct. App. 12/30/09), *trans. denied* (3/14/10) IAD PROCEDURE

- The IADA is an agreement among most states that provides for the return of prisoners so that pending charges from another jurisdiction can be resolved.
- Pursuant to the IADA, a defendant must be brought to trial within 180 days after he/she causes to be delivered to the prosecutor and the appropriate court of the prosecutor's jurisdiction written notice of his/her place of imprisonment and a request for final disposition of his/her case.
- The record in the present case did not establish that the Defendant caused to be delivered to either the trial court or the prosecutor his IADA early trial request.
- A demand pursuant to the IADA unquestionably requires delivery, and without delivery, the 180 day clock does not commence.

- The Court of Appeals held that the trial court did not err when it denied the Defendant's motion to dismiss the Indiana charge pending against him.

CRIMINAL RULE 4

Mork v. State, 912 N.E.2d 408 (Ind. Ct. App 8/28/09) CRIMINAL RULE 4(B)

- Once a defendant properly requests a speedy trial, the trial court must assign that case a meaningful trial date within the time prescribed by Criminal Rule 4(B).
- In the present case, the trial court found that Mork was not entitled to discharge because he was released on his own recognizance within the applicable 70 days, and his subsequent incarceration was not due to the charges pending in the present case.
- The record revealed that Mork requested a speedy trial on July 29, 2008, and that the trial court released him on his own recognizance 29 days later. Generally, once released from custody, a defendant receives no further benefit from Criminal Rule 4(B).
- The Court of Appeals concluded that Mork's subsequent incarceration was the result of an unrelated charge. Accordingly, the trial court did not err in denying the Defendant's motion for discharge.

State v. Jones, 918 N.E.2d 436 (Ind. Ct. App. 12/22/09) CREDIT DAYS
INCOMPETENT DEFENDANT

- In *State v. Davis*, 898 N.E.2d 285 (Ind. 2008), the Indiana Supreme Court affirmed the trial court's dismissal of charges against Davis who, after being declared incompetent to stand trial, had been confined in a state hospital for a period longer than her maximum possible sentence under the charges filed against her.
- The dispositive issue in the present case was whether Jones had been confined for a period beyond the maximum possible sentence upon conviction in all three of her pending cases.
- Jones was charged with three Class A Misdemeanor offenses. Each carried a maximum sentence of one year. In that Jones was alleged to have committed the second and third crimes while awaiting trial on the first charged offense, upon her convictions the trial court would have been required to order the sentence given in each case consecutive to the other sentences imposed.
- Jones served two actual days in jail upon her arrest in case one. She served one actual day in jail when arrested on the second charge. From the date of her arrest in case number three to the date of discharge hearing Jones had served a total of 375 actual days in either jail and/or a state hospital after being determined incompetent to stand trial.
- The Court held that a criminal defendant in a state mental health facility as part of a criminal proceeding earns credit time just as if he/she were confined in jail. Therefore, Jones was entitled to 756 days credit.
- Jones had, therefore, been confined beyond the maximum allowable sentences in her first and second cases, and had 26 days credit toward case number three.

- The Court of Appeals concluded that the trial court did not abuse its discretion in dismissing cases one and two, but did abuse its discretion in dismissing case number three.
- Case three was remanded to the trial court for further proceedings to determine whether given credit for time served after the initiation of her appeal, Jones was now eligible for dismissal of that case as well.

Curtis v. State, ____ N.E.2d ____ (Ind. Ct. App. 8/5/10) (No. 49A02-0911-CR1106)

DISCHARGE OF INCOMPETENT DEFENDANT

- Trial courts have inherent authority to dismiss criminal charges if the prosecution of such charges would violate a defendant's constitutional rights, including the right to due process.
- Holding criminal charges indefinitely over the head of one who will never have a chance to prove his innocence is a violation of a defendant's due process rights. *State v. Davis* (Ind. 2008).
- The Court of Appeals in *Curtis*, held that the trial court erred in denying the Defendant's motion to dismiss and for discharge due to his mental incompetence and inability to ever stand trial.

WAIVER OF JURY TRIAL

Garcia v. State, 916 N.E.2d 219 (Ind. Ct. App. 11/6/09), *trans. denied* (1/14/10)

WAIVER OF JURY TRIAL

- A waiver of jury trial in a felony case requires an assertion of waiver by a defendant to the trial court in writing or in open court.
- Counsel cannot waive a client's right to jury trial.
- The Court of Appeals in *Garcia* held that the same principle applies when a defendant waives his right to have a jury determine a Class D Felony Enhancement or Habitual Substance Offender finding.
- In the present case, the Court of Appeals concluded after a review of the totality of the communications between and among Garcia, the trial court, and Defendant's counsel, that it was apparent that Garcia did not acquiesce in his attorney's representation that Garcia waived his right to jury trial.
- Garcia did not personally communicate to the court that he wished to relinquish his right to have a jury determine whether his charged offense should be elevated to a Class D Felony and/or whether the Garcia was an Habitual Substance Offender.
- Garcia's Operating a Vehicle While Intoxicated, a Class A Misdemeanor conviction, was affirmed. The elevation of that conviction to a Class D Felony was reversed as was the Defendant's Habitual Substance Offender enhancement.

State v. Cooper, 918 N.E.2d 355 (Ind. Ct. App. 12/15/09), *trans. granted* (4/29/10)

FACTUAL BASIS FOR GUILTY PLEA

- The post-conviction court in the present case granted Cooper's request for relief finding that Cooper was prejudiced by the lack of an adequate factual basis to support his guilty plea.

- A trial court may not accept a guilty plea unless it determines that a sufficient factual basis exists to support that plea.
- A factual basis exists when there is evidence of the elements of the crime from which a trial court could reasonably conclude that the defendant is guilty. The purpose of the factual basis requirement is to ensure that a person who pleads guilty truly is guilty.
- A factual basis need not be established beyond a reasonable doubt. Rather, relatively minimal evidence can constitute a sufficient factual basis.
- Even if a factual basis contains an irregularity or inadequacy, the petitioner in a post-conviction relief proceeding is not afforded an automatic avenue of post-conviction relief.
- In the present case, the very nature of the Operating as an Habitual Traffic Violator crime to which the Defendant pled made the precise date and year of his driving an essential element of the crime charged.
- Therefore, the Court of Appeals concluded that time was of the essence with respect to the crime of Operating as an Habitual Traffic Violator in the present case, and the precise date of the offense including the year in which the offense as committed had to be established to prove that the offense charged actually occurred.
- In the present case, the charges read to the Defendant included a recitation of the date and place of the offenses alleged, but neither the county of the occurrence or the year when the occurrence was alleged to have occurred was presented as part of the factual basis at plea hearing.
- The Court of Appeals concluded that a sufficient factual basis did not exist sufficient to support Cooper's guilty plea.
- Cooper demonstrated during his post-conviction relief proceedings the existence of the requisite prejudice required to overturn his conviction in that he would not have pled guilty to the charged offense had he known that no basis existed for the charge to which he pled.
- Judgment of the post-conviction court was affirmed.

SUCCESSIVE PROSECUTIONS

State v. Dixon, 924 N.E.2d 1270 (Ind. Ct. App. 4/14/10)

- When Ollie Dixon was arrested for Operating a Vehicle While Intoxicated, he was checked for weapons and none were found.
- Subsequently, after Dixon was placed in a holding cell at the jail, authorities became aware that Dixon had a Colt .45 caliber semi-automatic handgun in his possession. A grand jury later indicted Dixon for criminal recklessness based upon the concealed weapon incident.
- The Defendant filed a motion to dismiss the criminal recklessness charge arguing that prosecution of that charge was barred by I.C. 35-41-4-4. The trial court granted the Defendant's motion.
- The State appealed arguing that the trial court should not have granted the Defendant's motion to dismiss.

- I.C. 35-41-4-4 provides in relevant part that:
(a) A prosecution is barred if . . .
(3) the instant prosecution is for an offense with which the defendant should have been charged in the former prosecution.
- The Court of Appeals concluded that “should have been charged” must be read in conjunction with Indiana’s joinder statute.
- The joinder statute provides that when two offenses are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan they should be joined.
- To determine whether contemporaneous crimes are part of a single scheme or plan, the reviewing court must examine whether the acts of each are connected by a distinctive nature, have a common *modus operandi*, and a common motive.
- In the present case, the trial court dismissed the Defendant’s criminal reckless charge upon its determination that there was no break in the chain of events that led to the filing of the two cases against Dixon.
- The Court of Appeals concluded that the charges in the present case did not arise within a short period of uninterrupted time or in a limited locale and therefore it could not be said that they shared a distinctive nature or common motive.
- The charge of criminal recklessness involved the alleged concealment of a firearm inside a jail cell well after the defendant’s arrest for the preliminary offense of OVWI.
- As for *modus operandi*, Dixon’s OVWI offense involved merely that, operating a vehicle while intoxicated. The nature of this driving offense and means used to commit it had little to no similarity to the ongoing concealment of a weapon inside the jail. There was no common *modus operandi*, the Court of Appeals said.
- In the absence of connection by a distinctive nature, and without common *modus operandi* or motive, the Court of Appeals could not conclude that the Defendant’s offenses constituted a single scheme or plan.
- The judgment of the trial court dismissing the defendant’s recklessness charge was reversed and the case remanded for further proceedings.

STATUTE OF LIMITATIONS

Sloan v. State, 926 N.E.2d 1095 (Ind. Ct. App. 5/17/10) CONCEALMENT

- Sloan was charged in 2008 with Class C Felony Child Molest which crime was alleged to have occurred in 1991. (He was also charged with Class A Felony Child Molest not at issue in this appeal.)
- The trial court denied the Defendant’s motion to dismiss the Class C Felony child molest charge based upon Sloan’s argument that the charging of the alleged crimes occurred beyond the applicable statute of limitations.
- The statute of limitations is designed to insure against prejudice and injustice to a defendant occasioned by a delay in prosecution. The applicable limitations period seeks to strike a balance between a defendant’s interest in being placed on notice so as to be able to formulate a defense for a crime charged, and the State’s interest in having sufficient time to investigate and develop a case.

- The burden rests upon the State to prove that the charged crime was committed within the statute of limitations.
- The statute of limitations for a Class C Felony is five years. I.C. 35-41-4-2(a)(1). That period is tolled, however, for any period in which the accused person conceals evidence of the offense, and evidence sufficient to charge the person with that offense is unknown to the prosecuting authority and would not have been discovered by that authority by the exercise of due diligence.
- The State argued that the concealment exception applied in the present case because Sloan had instructed his victim on hundreds of occasions not to tell, thus causing the victim to be afraid and to keep the Defendant's abuse a secret.
- Sloan repeatedly molested his victim for about seven years beginning in 1984 when she was six years of age. After each incident, the Defendant told his victim not to tell and made her afraid to report.
- The molestations stopped in 1991, however, and there was no indication that Sloan continued to intimidate his victim after that date.
- The Court of Appeals concluded, therefore, that the statute of limitations began to run in 1991, upon the occurrence of no further intimidation of the victim by the Defendant. Therefore, the statute of limitations expired in 1996.
- The Court of Appeals held that the trial court erred in denying Sloan's motion to dismiss his Class C Felony child molest charge, and the Defendant's Class C Felony conviction was reversed.

JUDICIAL ACTIONS

State v. Shackelford & McDonald, 922 N.E.2d 702 (Ind. Ct. App. 3/10/10), *reh'g denied* (5/11/10)

- The State brought this interlocutory appeal challenging the post-conviction court's denial of the State's motion for change of judge. It was the State's contention that various comments made by the presiding judge at a status conference regarding matters involving the appellees revealed a lack of impartiality that precluded him from taking further action in the present case.
- Post-Conviction Rule 1(4)(b) provides that "[a] change of judge shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice."
- The Supreme Court has earlier held that the provisions for a change of judge within the Post-Conviction Rules are neither automatic nor discretionary. Instead, this rule requires a judge to examine the affidavit submitted, treat the historical facts recited in the affidavit as true, and determine whether those facts support a rational inference of bias or prejudice.
- A motion for change of judge should be granted only if the evidence reveals such a high degree of favoritism or antagonism as to make fair judgment impossible.
- A judge's judicial remarks disapproving or approving of a parties' arguments prior to a final ruling ordinarily do not support a bias or partiality challenge.
- Although the Court of Appeals admonished the post-conviction judge in the present case that it was not appropriate for him to confer regarding the outcome of

- the case with the former judge on the case, the Court concluded that the post-conviction court's preliminary legal assessment of the case based upon the evidence in the record and the pleadings and memoranda filed in the case did not amount to personal bias or prejudice on the part of the presiding judge that would render a fair judgment on the merits of the case impossible.
- The Court of Appeals held that the post-conviction court properly denied the State's motion for change of judge.

Hollinsworth v. State, 928 N.E.2d 201 (Ind. Sup. Ct. 6/3/10) JUDICIAL ACTIONS CAN RESULT IN REVERSAL OF CONVICTION

- Hollinsworth argued on appeal that comments made by the trial judge at the time of her bench trial showed that the Court was not impartial.
- After trial had begun, Hollinsworth indicated her desire to accept the State's earlier rejected plea agreement. In response to this pronouncement, the Judge stated that if Hollinsworth was found guilty "she was going to jail for a year." The Judge further stated, "I don't know if I want to take your plea, I'd rather just go to trial, I think. I don't like being jerked around at all, all right?" Further, during sentencing Hollinsworth's attorney stated that the two charges against the defendant filed after the charges for which she was on trial were "only charges." The Court responded, "Sure they are."
- Canon 2 of the Code of Judicial Conduct requires judges to perform their duties of judicial office impartially, competently, and diligently.
- A judge must be objective, open-minded, patient, dignified, and courteous to litigants.
- The Supreme Court said that a judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned including in circumstances when the judge has a personal bias or prejudice concerning a party.
- The Supreme Court held that the trial court's behavior in this case did not meet the standards mandated by the Canons of Judicial Conduct. The Defendant's conviction was reversed and the case was remanded for a new trial.

Everling v. State, 929 N.E.2d 1281 (Ind. Sup. Ct. 7/8/10)

- At issue in this appeal was whether the conduct of the trial judge during the Defendant's trial deprived Everling of his right to a fair trial.
- A trial before an impartial judge is an essential element of due process.
- In assessing a trial judge's partiality, the reviewing court will examine the judge's actions and demeanor while recognizing the need for latitude to run the courtroom and maintain discipline and control during trial.
- Generally, adverse rulings and findings by a trial judge from past proceedings with respect to a particular party are not sufficient reasons to believe the judge has a personal bias or prejudice against that party.

- In the present case, the Defendant characterized his attempts to demonstrate the judge's partiality into four categories: the judge's comments to defense counsel, comments in front of the jury, uneven tolerance of late filings, and erroneous rulings.
- The Supreme Court concluded that taken together the judge's comments and procedural rulings demonstrated a lack of impartiality. The Court stated that the one-sidedness of the judge's comments and attempts to help the prosecution in making and responding to objections was improper.
- The Court could not ignore the cumulative effect of the judge's disparaging comments throughout the course of the proceedings.
- The Supreme Court held that the cumulative result of the judge's comments, exclusions, and general demeanor toward the defense was below the standard toward which Indiana strives.
- Everling's convictions were reversed.

Patterson v. State, 926 N.E.2d 90 (Ind. Ct. App. 4/29/10) RECUSAL OF JUDGE
MANDATED BY PRIOR INVOLVEMENT IN THE CASE

- Patterson was sentenced to ten years at the Department of Correction after he pled guilty to Dealing in Cocaine as a Class B Felony. At issue on appeal was whether the Defendant's attorney rendered ineffective assistance of counsel when he failed to move for the sentencing judge's recusal.
- Patterson entered into a plea agreement that provided that the sentence to be imposed would be left to the Court's discretion with a ten-year cap.
- The defendant failed to appear for sentencing and was not located for over a decade thereafter.
- By the time Patterson was brought before the Court for sentencing, a new judge presided over the Court in which he appeared. That Judge did not disclose at sentencing that he had earlier been involved in Patterson's case as a prosecuting attorney. Defense counsel did not move for a change of judge.
- A change of judge is neither automatic nor discretionary, but rather requires a trial judge to make a legal determination, not a self-analysis, of actual bias or prejudice. A Criminal Rule 12 claim for a change of judge requires the judge to examine the affidavit submitted, read the facts recited therein as true, and determine objectively, not subjectively, whether the facts presented support a rational inference of bias or prejudice.
- A trial judge also has the discretion to disqualify *sua sponte* whenever the existence of any semblance of judicial bias or impropriety in a court proceeding comes to the judge's attention.
- Canon 2.11(A) of the Indiana Judicial Canons states that:
"A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(6) The judge:

(b) served in governmental employment, [and] in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding

- In the present case, the judge's name as a prosecutor appeared numerous time in the record of the pending proceedings. Ample opportunity existed for Defendant's counsel to discover the judge's prior participation in the case well in advance of the sentencing hearing and counsel could have filed a timely motion for change of judge.
- The Court of Appeals held that a judge must disqualify from a case in which he/she actively served as an attorney for one of the parties regardless of whether actual bias or prejudice exists.
- The Defendant's plea agreement left to the court's discretion the sentence to be imposed within the parameters of the plea agreement. The Court noted that it could only be definitively proven that Patterson was not prejudiced if the minimum sentence under the plea agreement had been imposed.
- Given the mandatory disqualification language in the Judicial Conduct Code, however, the Court of Appeals concluded that Patterson was prejudiced by the simple fact that he was denied his right to have an impartial judge preside over his criminal case.
- In that the Judge would have been required to recuse if defense counsel had brought the mandatory recusal requirement to the Court's attention, the Court of Appeals held that Defendant's trial counsel was ineffective. Patterson's case was remanded and the trial court was instructed to assign the case to a different judge.

TRIAL ISSUES

DOYLE V. OHIO POST-ARREST SILENCE

Lainhart v. State, 916 N.E.2d 924 (Ind. Ct. App. 11/23/09)

- The State's use at trial for impeachment purposes of a defendant's silence at the time of arrest, and after he has received his *Miranda* warnings, violates the Due Process Clause of the Fourteenth Amendment. *Doyle v. Ohio*, 426 N.E.2d 610, 619 (1976)
- The Due Process Clause does not, however, prohibit impeachment using a defendant's pre-arrest silence, or his post-arrest, pre-*Miranda* silence.
- Indiana is aligned with the federal constitutional standards on this issue.
- When a defendant asserts that a *Doyle* violation has occurred, he ordinarily bears the burden of showing that *Miranda* was given prior to the post-arrest silence used by the State for impeachment purposes.
- On cross-examination in the present case, the State asked Lainhart why he failed to come forward with his side of the story "after these charges were filed against [him]"
- The State was not prohibited from impeaching Lainhart with his pre-arrest silence, the Court said.

- Lainhart failed to meet his burden of showing that he received *Miranda* warnings prior to the silence with which he was impeached. The Court found no *Doyle* violation and held that the State's cross-examination was proper.
- In this same appeal, the Court of Appeals found that the prosecutor's use of the Defendant's failure to call witnesses to confirm his alibi during cross-examination and in closing argument was improper. The trial court did, however, instruct the jury that the defendant was under no obligation to prove anything at trial which remedies this particular error.
- The opinion also addressed the prosecutor's vouching for a State's witnesses in *voir dire*.
- The *Lainhart* opinion reminds us that the function of *voir dire* is not to educate jurors, but to ascertain whether jurors can render a fair and impartial verdict in accordance with the law and the evidence. It is furthermore inappropriate for the prosecutor to make an argument which takes the form of personally vouching for a witness. A prosecutor may comment on the credibility of the witnesses only if the assertions made are based on reasons which arise from the evidence. In this case, the Court of Appeals agreed with the Defendant that the prosecutor's remarks constituted improper indoctrination, vouching, and commentary on the justness of the cause.
- The Court of Appeals concluded that the State's actions placed the Defendant in grave peril and that the actions of the State taken together constituted fundamental error. The Court further concluded that the trial court's admonishments were not sufficient to cure the totality of the State's misconduct. Lainhart's convictions were reversed.

Akard v. State, 924 N.E.2d 202 (Ind. Ct. App. 3/30/10)

- Determining whether the use of a defendant's silence is in violation of his Fifth Amendment Rights turns on the manner in which the prosecution used the evidence and whether the silence questioned was before or after his/her *Miranda* warnings.
- In the present case, the State used Akard's post-arrest, pre-*Miranda* silence as substantive evidence in its case-in-chief as opposed to for purposes of impeachment of the Defendant on cross-examination.
- This scenario was addressed by the Seventh Circuit in *U.S. v. Hernandez*. In *Hernandez*, the Seventh Circuit concluded that even if a defendant testifies at trial, it is a violation of his Fifth Amendment Right for the State to introduce evidence of his post-arrest, pre-*Miranda* silence in its case-in-chief.
- The Court of Appeals held that the State's questions directed to a police officer witness regarding Akard's silence after his arrest, but before *Miranda* was read to him, violated the Defendant's Fifth Amendment Right.
- In this particular case, the Defendant alleged fundamental error. To support a fundamental error claim, a defendant must demonstrate that the error made worked to his actual and substantial disadvantage, infecting and tainting the entire trial.

- The brevity of the references to the Defendant's silence in the present case, in comparison to other substantial evidence presented to prove his guilt, led the Court of Appeals to conclude that the brief mention of Akard's pre-*Miranda* silence did not rise to the level of fundamental error.

DEFENDANT'S STATEMENTS IN CONJUNCTION WITH A PLEA AGREEMENT

Gonzalez v. State, 929 N.E.2d 699 (Ind. Sup. Ct. 5/19/10)

- The Defendant's letter of apology to his victim was later admitted at trial after Gonzalez's plea agreement was rejected. Gonzalez was convicted.
- The Court of Appeals reversed the Defendant's conviction, finding that Gonzalez's letter was inadmissible because it was written as a part of plea negotiations and that this error "likely had significant effect on the jury."
- On transfer, the Supreme Court concluded that Gonzalez's letter was an attempt to persuade the victim to accept the Defendant's tendered plea agreement.
- Statements in connection with a plea agreement are not admissible pursuant to Indiana Evidence Rule 410.
- The Supreme Court found the Defendant's letter to be a communication made in connection with the Defendant's plea agreement. The Supreme Court agreed with Akard that the trial court erred in admitting his letter at trial.
- The Supreme Court further determined, however, that other evidence presented overwhelmingly proved the Defendant's guilt without the disputed letter. The Court concluded, therefore, that the admission of the Defendant's letter at trial was harmless error.
- The Defendant's convictions and sentence were affirmed.

DEMONSTRATIVE EVIDENCE IN CLOSING

Miller v. State, 916 N.E.2d 193 (Ind. Ct. App. 10/30/09), *trans. denied* (1/14/10)

DEMONSTRATIVE EVIDENCE IN CLOSING ARGUMENT

- At issue in this appeal was whether the trial court erred when it allowed the State to use a YouTube video in closing argument which video did not reflect the facts of Miller's case.
- The video utilized by the State was created for use by school administrators and was intended to show how easy it is to conceal weapons inside a person's clothing.
- Indiana Courts have earlier held that charts and diagrams may be received into evidence after a proper foundation has been laid, if the fact to be evidenced by the chart or diagram is itself otherwise relevant, material, and competent. Thus, the use of admitted evidence in different forms during summations has been permitted for demonstrative purposes.
- The video utilized in the present case, however, was not merely a presentation in a different format of evidence that had already been admitted.

- The State conceded on appeal that the video was not connected to the present case. The whole issue about the ability to hide weapons under clothing was ultimately deemed unimportant.
- The Court of Appeals agreed with Miller that the video shown in closing at his trial had the effect of bringing alive the passions of the jury and suggesting that not only had the Defendant committed the crime charged, but also that he had multiple firearms on his person and intended to use them to cause injury or death.
- The Court of Appeals reversed Miller's conviction.

JURY ISSUES

JURY SELECTION

Berghuis v. Smith, 130 S. Ct. 1382 (U.S. Sup. Ct. 3/30/10) "FAIR CROSS SECTION" CHALLENGES

- The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross-section of the Defendant's community.
- At issue in the present case was whether that right to a fair cross-section of the community was accorded Diapolis Smith, an African-American convicted of second-degree murder by an all-white jury in Kent County, Michigan.
- At the time of Smith's trial, Kent County's population was 7.28% African-American. The jury pool from which Smith's jurors were drawn included 6% African-Americans.
- To establish a *prima facie* showing of a Sixth Amendment "fair-cross-section" violation a defendant must show:
 - That the group alleged to have been excluded is a distinctive group in the community;
 - That the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
 - That the under-representation is due to systematic exclusion of the group in the jury selection process.

Duren v. Missouri, 439 U.S. 357 (1979)
- The U.S. Supreme Court held that the Michigan Supreme Court's decision rejecting Smith's fair cross-section claim was consistent with *Duren* and "involved [no] unreasonable application o[f] clearly established Federal law," Sec. 2254(d)(1).

Killebrew v. State, 925 N.E.2d 399 (Ind. Ct. App. 4/6/10) BATSON CHALLENGES

- Killibrew's challenge on appeal was the trial court's alleged error in overruling his *Batson* objection to the exclusion of prospective juror L.S.
- *Batson* developed a three-step test to determine whether a peremptory challenge has been used improperly to disqualify a potential juror on the basis of race. The

procedure by which a *Batson* challenge to be made was set forth in the *Killibrew* opinion.

- The party contesting the peremptory challenge must have made a *prima facie* showing of discrimination on the basis of race.
- After the contesting party makes that *prima facie* showing of discrimination, the burden shifts to the party exercising its peremptory challenge to present a race-neutral explanation for using the challenge.
- If a race-neutral explanation is proffered, the trial court must then decide whether the challenger has carried his/her burden of proving purposeful discrimination.
- Courts need to accept any facially neutral reason for striking and should consider all relevant circumstances in assessing *Batson*-challenged peremptory strikes.
- In the present case, the parties agreed that Killebrew made a *prima facie* showing of discrimination and that the State provided a facially neutral reason for the strikes exercised.
- The issue on appeal was whether Killebrew established that the State's facially neutral reasons were merely pretextual and a mask for purposeful discrimination.
- The Court of Appeals did not give any weight to the prosecutor's claim in the present case that prospective juror L.S. was too emphatic in agreeing with defense counsel.
- As for the State's claim that L.S. was challenged due to his concern about the impact of jury service on his teaching career, the Court of Appeals found that other prospective jurors who were white and not struck had expressed similar or even more pressing concerns about the impact of jury service on their lives.
- Further, the appellate court concluded that there was no meaningful distinction between how L.S. described his concept of the State's burden of proof and how two other jurors who remained on the jury explained it.
- *Batson* violations are rare, but not impossible to prove, the appellate court said.
- Trial courts must be vigilant in ensuring that the jury selection process in criminal cases is free from any hint of bias.
- The Court of Appeals concluded that Killibrew established that the State's peremptory strike of L.S. was the result of purposeful discrimination and a *Batson* violation.
- Finding that the trial court erred in concluding that the State's strike of L.S. from the jury venire was not discriminatory, the Court of Appeals reversed Killibrew's convictions and remanded his case for a new trial.

JUROR MISCONDUCT

Barnett v. State, 916 N.E.2d 280 (Ind. Ct. App. 11/12/09)

- When an event occurs that may improperly influence a jury, the trial court should make a determination of the likelihood of resulting prejudice, both upon the basis of the content of the event and the likelihood of its having some persuasive impact on a juror or jurors.

- Upon an allegation of juror taint, the trial court is obligated to interrogate jurors only if the court determines in its discretion that the risk of prejudice appears substantial as opposed to imaginary or remote.
- If the court determines that the complained of exposure to assertedly prejudicial information does not raise a substantial risk of prejudice; the court has no responsibility to interrogate the juror(s) or to take further remedial action.
- In the present case, the trial judge observed one of the jurors to have a “near epileptic fit” during the testimony of one of the State’s witnesses. The judge excused the jury and advised counsel of his observations. Counsel and the judge spoke with the juror individually. The juror stated that she felt that she already had formed her opinion, but advised that she had not shared that opinion with her fellow jurors.
- After the juror was removed, defense counsel moved for a mistrial. That motion was denied.
- In that the juror had not expressed her opinion to other jurors and in that the trial court determined no risk of prejudice, the trial court had no responsibility to interrogate the other jurors or take other remedial action, the Court of Appeals concluded. The appellate court could not say that Barnett had demonstrated that the conduct complained of was both error and had a probable persuasive effect on the jury’s decision.
- The Court of Appeals held that the trial court did not err in denying Defendant’s motion for mistrial.

JURY RULE 24 – COMMUNICATION WITH JUROR DURING TRIAL

Holden v. State, 916 N.E.2d 223 (Ind. Ct. App. 11/9/09) JURY RULE 24
COMMUNICATION WITH A JUROR DURING TRIAL

- During a break in the Defendant’s trial, after a deputy sheriff had testified as an expert on firearms, the deputy was asked a question relating to his testimony by a juror outside the courtroom. Upon learning of this communication, the Defendant moved for a mistrial.
- The trial judge acknowledged that he had forgotten to ask the jurors if they had any questions of the witness prior to the witness being excused. The trial judge suggested that he recall the witness and ask the jurors in open court if they had any questions of the witness.
- The prosecutor suggested that the juror who had posed the question to the witness be excused or in the alternative that the juror be individually questioned outside the presence of the other jurors.
- Defendant’s counsel stated that he would prefer the Court’s proposed plan to that of the prosecutor.
- The jury was returned into the courtroom and the judge asked the jurors if they had any questions for the earlier excused witness and the witness was questioned.
- The sole issue on appeal was whether the trial court erred in denying Holden’s motion for mistrial because a juror questioned a witness outside the courtroom during a trial recess.

- Juror misconduct involving an out-of-court communication with an unauthorized person creates a rebuttable presumption of prejudice.
- A defendant seeking a new trial because of juror misconduct must show that the juror misconduct was gross and probably harmed him.
- The dispute in the present case was not about the propriety of the juror's communication with the deputy sheriff, which everyone agrees was improper. Instead, the Court of Appeals was asked to decide whether the trial court's failure to grant the Defendant's mistrial request was an error.
- Replacement of the juror who had communicated with the deputy would have remedied the situation, thus making mistrial unnecessary, the Court of Appeals said.
- In that defense counsel was not willing to accept this proposal, however, the Court of Appeals then had to determine whether the juror's misconduct was sufficiently prejudicial to warrant a mistrial.
- The deputy testified on direct examination that he could not tell by looking at pictures he examined whether the gun used in the commission of the charged crime was a six or an eight-shot. According to the witness, he told the juror outside the courtroom that the weapon used was a six-shot. In that the gun in the Defendant's possession at the time of his arrest was an eight-shot, the statement of the witness to the juror outside the courtroom was, in fact, beneficial to the Defendant.
- When returned into the courtroom for further questioning, the witness testified that he could not tell by looking at the photographs presented to him whether the gun was a six or an eight-shot.
- The Court of Appeals concluded that the trial court did not abuse its discretion when it denied the Defendant's motion for mistrial.

MISTRIAL

Jackson v. State, 925 N.E.2d 369 (Ind. Sup. Ct. 4/27/10) DEFERENCE TO TRIAL COURT IN DECLARING MISTRIAL

- During Jackson's first trial, the trial court declared a mistrial after interviewing jurors regarding their exposure to a newspaper article that reported on a letter written by the Defendant to the Prosecutor.
- The Defendant was convicted at a second trial.
- The Court of Appeals reversed the Defendant's conviction by the newly impaneled jury finding that insufficient grounds existed to discharge the first jury. The Court of Appeals held that the Defendant's trial by a second jury violated the Double Jeopardy Clause of the Fifth Amendment.
- The Supreme Court disagreed with the Court of Appeals. The Supreme Court held that the first trial court's determination of the need to discharge the first jury was entitled to deference and was not an abuse of discretion.
- The Supreme Court reversed the Court of Appeals and affirmed the Defendant's conviction.

JURY DELIBERATIONS

Parks v. State, 921 N.E.2d 826 (Ind. Ct. App. 2/18/10) *reh'g denied* (5/18/10)

REPLAYING WITNESS TESTIMONY DURING JURY DELIBERATIONS

- Two hours into deliberations, upon the foreman advising the trial court that he did not think the jury was close to a verdict, the trial judge asked the jury if there was anything the court or counsel could do to assist the jury in their deliberations.
 - The foreman told the judge that if the jury had a couple of questions answered it was very possible a verdict could be reached. Counsel and the Court determined that the questions subsequently submitted could not be answered.
 - Thereafter, the jury asked for a transcript of the burglarized homeowner's testimony.
 - Parks objected to the replaying of the homeowner's testimony. Two hours later the judge advised the parties that the jury had still not reached a verdict and was at an impasse. The judge then advised the parties of his intent to replay the testimony of the homeowner for the jury.
 - The Court replayed the testimony, but the parts of that testimony to which Parks objected were redacted. Approximately twenty minutes later, the jury reached a verdict.
 - If a jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate. Jury Rule 28.
 - I.C. 34-36-1-6 provides that if, after the jury retires for deliberation:
 - (A)(1) there is a disagreement among the jurors as to any part of the testimony; or
 - (2) the jury desires to be informed as to any point of law arising in the case;
- The jury may request the officer to conduct the jury into court, where the information required shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties.
- In the present case, several juror questions were not answered. The foreperson indicated that the jurors were not close to reaching a verdict and requested specifically the testimony of one of the witnesses. Jury deliberations were obviously unable to progress after that replay of testimony was requested.
 - The Court of Appeals concluded that the trial judge did not err in invoking Jury Rule 28 and playing the recorded testimony of one of the State's witnesses for the jury.

POST-CONVICTION

SENTENCING ISSUES

Malenchik v. State, 928 N.E.2d 564 (Ind. Sup. Ct. 6/9/10) ROLE OF LSI-R SCORE IN SENTENCING CRIMINAL DEFENDANTS

- At issue in this appeal was the manner in which a trial judge may consider the results of the LSI-R and SASSI or other similar assessment tools in sentencing a criminal defendant.
- The Supreme Court held that the results of the LSI-R and SASSI offender assessments are appropriate supplemental tools for judicial consideration at sentencing.
- Such evaluations and their scores are not intended to serve as aggravating or mitigating circumstances or to determine the gross length of a defendant's sentence, but courts may employ such results in formulating the manner in which a sentence will be served.
- The Supreme Court held in the present case that the trial court had not erred in considering the LSI-R and SASSI assessment results in formulating Malenchik's program of penal consequence. The judgment of the trial court was affirmed.

J.S. v. State, 928 N.E.2d 576 (Ind. Sup. Ct. 6/9/10) ROLE OF LSI-R SCORE IN SENTENCING CRIMINAL DEFENDANTS

- The trial court declined J.S.'s request that the Court give mitigating weight to the Defendant's low LSI-R score. J.S. appealed.
- The relative weight given aggravating and mitigating factors by the trial court is not subject to appellate review. To the extent that the trial court in the present case considered but elected to give no mitigating weight to the Defendant's LSI-R score, the trial court's weighing decision was not reviewed.
- An LSI-R score is not in the nature of, nor may it be considered an aggravating or mitigating circumstance.
- Instead, the function of such a score is to supplement and enhance a judge's evaluation, weighing, and application of the other sentencing evidence in the formulation of an individualized sentencing program appropriate for each individual defendant.
- The judgment of the trial court was affirmed.

Kiplinger v. State, 922 N.E.2d 1261 (Ind. Sup. Ct. 3/22/10) LWOP ABSENT UNANIMOUS JURY RECOMMENDATION

- Kiplinger appealed his Life Without Parole sentence imposed by the trial judge after the jury failed to reach a unanimous sentencing recommendation.
- Imposition of LWOP is controlled by I.C. 35-50-2-9.
- The Sixth Amendment to the U.S. Constitution prohibits a judge from imposing an LWOP sentence unless a jury has determined that each qualifying aggravating circumstance has been proven beyond a reasonable doubt.

- The Supreme Court earlier decided a number of cases in which the jury unanimously recommended LWOP or death without making an explicit finding that the State had proved the alleged aggravating circumstance(s) beyond a reasonable doubt. In those cases, the appellate courts held that the jury's guilt phase verdict establishing the existence of the requisite aggravating circumstance(s) met the requirements of the Sixth Amendment. The arguments made in those cases never turned on the State's argument made in the present case.
- In the present case, the jury was unable to reach a unanimous recommendation on imposition of life without parole, and the guilty phase verdicts did not necessarily establish that the aggravating circumstances alleged were proved beyond a reasonable doubt.
- Although the most plausible inference may have been as the State argued, the guilty verdicts in the present case could have been rendered without a finding by the jury that the Defendant intentionally killed his victim while committing or attempting to commit rape.
- The sentence imposed by the judge in the present case was based on facts that extended the sentence beyond the maximum authorized by the jury's verdict. The Supreme Court concluded that the jury made no finding beyond a reasonable doubt that the necessary aggravator in support of an LWOP sentence existed in the present case. Nor did the jury's verdicts in the guilt phase of trial necessarily establish that the jury found the necessary aggravating circumstance beyond a reasonable doubt.
- The Supreme Court vacated the LWOP sentence and remanded the case for sentencing.
- In footnotes to the *Kiplinger* opinion, the Supreme Court noted that should the State elect to dismiss its LWOP request, the trial court could then re-sentence the Defendant to a term of years. Otherwise, the trial court was directed to convene a new penalty phase jury and conduct further proceedings pursuant to the LWOP sentencing statute.

Shepherd v. State, 924 N.E.2d 1274 (Ind. Ct. App. 4/14/10) HABITUAL OFFENDER ENHANCEMENT

- Shepherd appealed the denial of his post-conviction relief petition. Shepherd argued that his trial counsel and appellate counsel were ineffective by failing to argue that the State was statutorily prohibited from seeking to have him sentenced as an habitual offender.
- The Defendant argued that neither his underlying dealing conviction nor his prior Texas drug dealing conviction could be relied upon to satisfy the habitual offender statutory requirement that a defendant have more than one unrelated dealing conviction.
- The Court of Appeals concluded that Shepherd's underlying Dealing in Cocaine conviction could be counted in determining his total number of unrelated convictions under I.C. 35-50-2-8(b)(3)(C).
- As for Defendant's argument that his 1999 Texas conviction for Dealing Cocaine could not be used in support of a finding that he was an Habitual Offender, the

Court of Appeals determined that Shepherd was convicted in Texas of a Texas state jail felony which conviction was equivalent to an Indiana Class D Felony and not equivalent to a Class D Felony reduced to a Class A Misdemeanor in Indiana.

- The Court of Appeals concluded that this conviction also could be counted toward the Defendant's total number of unrelated convictions.
- The Court held that 35-50-2-8(b) does not preclude the State from seeking to have the Defendant sentenced as an habitual offender, and that neither trial nor appellate counsel rendered ineffective assistance in failing to pursue a strategy based upon a (b)(3)(C) challenge to Shepherd's Habitual Offender eligibility.
- The judgment of the post-conviction court was affirmed.
- The Court of Appeals invited the legislature or the Supreme Court to provide more specific direction in implementation of this confusing statute.

Nicoson v. State, 919 N.E.2d 1203 (Ind. Ct. App. 1/20/10), *trans. granted* (3/17/10)
POSSESSION OF A DEADLY WEAPON ENHANCEMENT – DOUBLE
JEOPARDY?

- This case of first impression reviewed the application of double jeopardy principles to a defendant's sentence enhanced upon his use of a deadly weapon.
- Nicoson appealed the five year sentence enhancement the trial court imposed for his use of a firearm following his conviction for Confinement with a Deadly Weapon, a Class B Felony.
- The Defendant argued that the enhanced penalty constituted an impermissible double enhancement in violation of double jeopardy principles.
- The Fifth Amendment provides that no person shall be subject to the same offense to be twice put in jeopardy. The Indiana Constitution likewise provides for this protection.
- On appeal, the Court of Appeals concluded that the Defendant's conviction for Confinement and subsequent enhancement relied upon separate facts. Confinement was elevated to a Class B Felony because at the time of the confinement, Nicoson was armed with a deadly weapon. The elevation to a higher felony occurred, therefore, because of Nicoson's possession of a gun, not because of his use of a weapon. Under the plain language of the Confinement statute, the State need only prove the defendant committed the act of confinement while armed with a deadly weapon.
- The enhancement statute, I.C. 35-50-2-1, refers, however, to actual use of a firearm in the commission of one of the statutorily enumerated offenses.
- The Court of Appeals held that it was not a violation of double jeopardy principles for the trial court to sentence Nicoson as a Class B felon because he was in possession of a deadly weapon at the time he confined his victim, and also enhance that sentence in light of the Defendant's use of the gun he possessed.
- The judgment of the trial court was affirmed.

Hoepfner v. State, 918 N.E.2d 695 (Ind. Ct. App. 12/29/09) PROBATION TERM – LIE DETECTOR TESTING

- The trial court imposed as a condition of probation a requirement that Hoepfner periodically submit to lie detector tests to determine whether he was using drugs and/or alcohol during the term of his probation.
- A trial court is vested with broad discretion in establishing conditions of probation. The only limitation placed on this discretion is that the conditions imposed must have a reasonable relationship to the treatment of the accused and the protection of the public.
- When a defendant contends that a probation condition is unduly intrusive on a constitutional right, three factors must be balanced:
 - The purpose sought to be served by probation;
 - The extent to which the constitutional rights enjoyed by law-abiding citizens should be afforded to probationers; and
 - The legitimate needs of law enforcement.
- The Court of Appeals found appropriate the probation condition that required Hoepfner to submit to a lie detection test as requested by his probation officer to determine drug and/or alcohol use.
- The Court, held, however that the portion of the written term of the Defendant's probation that stated that positive polygraph results might be used against the Defendant in court proceedings and will constitute a violation of probation to be inappropriate.
- A court cannot coerce a defendant to agree to the admissibility of scientifically unreliable evidence that otherwise would be inadmissible. The appellate court therefore directed that this portion of the Defendant's probation condition be deleted.
- The Court went on to say, however, that it is permissible to require a defendant to submit to such exams, the results of which may be used in future probation revocation proceedings.
- The Court of Appeals acknowledged the Defendant's concern that the disputed clause in his disputed probation term seemed to deprive him of his due process rights by stating that the results if positive would constitute a probation violation. This, the Defendant argued, seemingly removed the State's obligation to prove that a violation had actually occurred.
- The appellate court set forth in the *Hoepfner* opinion suggested recommended language to be utilized in crafting a probation term that requires submission to lie detector testing.
- "You shall not use, possess, or be in the presence of any illegal drugs or controlled substances. Further, you shall not ingest any product containing hemp. You shall submit to a lie detection test and/or alcohol and drug detection test equipment, as requested by your probation officer, to determine personal drug and/or alcohol use and your knowledge of drug trafficking. Further, you will submit to a blood, urine, or hair analysis within two hours of the time of request by your probation officer to determine the presence of alcohol, drugs, or controlled substances in your system. Positive results in any of the above tests except for the lie detection test may be used against you in a court proceeding and

may constitute a violation of your probation. Positive results in a lie detection test may be used against you in a probation revocation proceeding and may constitute a violation of your probation. Where there is a cost involved for any of the above testing, you will be responsible for and obligated to pay the cost of such testing and you will not tamper with or attempt to alter any of the tests.”

Perry v. State, 921 N.E.2d 525 (Ind. Ct. App. 2/18/10) SENTENCE CONSECUTIVE TO MICHIGAN SENTENCE

- The trial court ordered Perry’s ten-year aggregate Indiana sentence served consecutive to his Michigan term of incarceration for unrelated criminal acts. At the time of sentencing in Indiana, the Defendant was serving a sentence in Michigan following his convictions there for Felony Armed Robbery, Felony Assault with Intent to Rob, and First Degree Felony Home Invasion.
- It is well established that there is no right to serve concurrent sentences for different crimes in the absence of a statute providing for concurrent sentences. Further, concurrent sentences may be ordered only when they are to be served at the same institution.
- Moreover, the Court said, a defendant is not entitled to credit on an Indiana sentence while he is incarcerated in another jurisdiction for a totally different offense.
- Sentences to penal institutions of different jurisdictions are cumulative and not concurrent.
- The Court of Appeals held that the trial court in the Perry case did not abuse its discretion in ordering Perry’s Indiana sentence to run consecutive to his previously imposed sentence in Michigan.

Buss v. Harris, 926 N.E.2d 110 (Ind. Ct. App. 5/17/10) SEX OFFENDER REGISTRATON REQUIREMENT

- The Indiana Department of Correction appealed the trial court’s order requiring the IDOC to update the State’s Sex Offender Registry and remove the term “SEX PREDATOR” and statement “lifetime notification” from Harris’s offender detail. The DOC was also ordered to change its imposed sex offender reporting requirement as to Harris.
- The issue presented in this DOC appeal was whether the trial court erred in so ordering.
- The Department of Correction cannot make a sexually violent predator determination after sentencing hearing is concluded (just as the trial court cannot do so after a violation of probation).
- In this appeal, the Court of Appeals also rejected the State’s argument that the Defendant’s status changed by operation of law.
- The Court of Appeals held that the trial court did not err in concluding that the DOC was not authorized by statute to make a determination of and change to Harris’s status on the Indiana Sex Offender Registry.
- Further, the Court of Appeals concluded, the trial court correctly determined that Harris’s reporting period should be ten years, not life.

Hevner v. State, 919 N.E.2d 109 (Ind. Sup. Ct. 1/6/10) SEX OFFENDER
REGISTRATION REQUIREMENT = VIOLATION OF EQUAL PROTECTION
CLAUSE

- At the time Hevner was charged with Possession of Child Pornography, a person in Indiana convicted of that crime for the first time was not required to register as a sex offender.
- While Hevner's case was pending, however, Indiana's Sex Offender Registration Act was amended to require anyone convicted of Possession of Child Pornography to register regardless of whether or not the person had accumulated a prior unrelated conviction.
- At the time of conviction, based upon this change in the law, Hevner was required to register as a sex offender. He appealed that reporting requirement.
- Hevner contended on appeal that to require registration in his situation violated the Equal Protection Clause of both the United States and Indiana Constitutions.
- If the intent of a newly enacted law is to punish, the inquiry ends there and such an order is precluded by the Equal Protection Clause.
- If, however, a court concludes that the legislature intended a non-punitive regulatory scheme other than punishment, the court must further examine whether the statutory scheme at issue is so punitive in effect as to negate that intention thereby transforming what was intended as a civil regulatory scheme into a criminal penalty.
- The Supreme Court assumed without deciding that the amendment to the reporting statute at issue in this case was intended as a civil regulatory scheme. The Court then addressed the seven factor test utilized to determine whether a regulatory scheme is punitive in nature.
- The Supreme Court concluded that as applied to Hevner the SORA violated the Indiana Constitution's Equal Protection Clause because it imposed burdens upon the Defendant that had the effect of adding punishment beyond that which could have been imposed at the time the crime with which the Defendant's crime was committed.
- As to the Defendant's complaint that the term of probation that he not reside within 1000 feet of school property was unreasonable, the Supreme Court did not agree.
- The Supreme Court reversed the portion of the Defendant's sentencing order directing Hevner to register as a sex offender and remanded his case for further proceedings.

Brogan v. State, 925 N.E.2d 1285 (Ind. Ct. App. 5/6/10) RELIEF FROM SEX
OFFENDER REGISTRATION REQUIREMENT

- This opinion outlines the history of the Indiana Sex Offender Registration Act. I.C. 11-8-8-22 (as amended 2010) provides that a sex offender may under certain circumstances file a petition to have his/her name removed from the Sex Offender Registry and thereby relieve himself/herself of the duty to register as a sex offender.

- The provisions of this statute are made applicable if there has been a change in federal or state law after June 30, 2007 that impacts the offender. The provisions of I.C. 11-8-8-22 as amended effective March 24, 2010, explicitly authorize an offender to raise an Equal Protection claim in a petition seeking relief from the sex offender registration requirement.
- Although currently incarcerated at the Department of Correction as the result of a Failure to Register as a Sex Offender conviction in Huntington County, Brogan filed his petition for relief under his original cause number in the Noble Superior Court.
- The State argued that Noble Superior Court lacked jurisdiction to order Brogan's name removed from the Sex Offender Registry, and that the Noble Superior Court properly denied Brogan's motion.
- Under the new legislative enactment referenced above, the General Assembly expressed its intent that a petition seeking relief from the obligation to register as a sex offender should be filed in a county other than the county where the offender was originally convicted if the offender has no current connection to that county.
- I.C. 11-8-8-22 provides that a petitioner shall file his/her petition in a circuit or superior court of the county in which the offender resides. If he/she resides in more than one county the statute directs that he/she file in the county in which he/she resides the greatest time. If the petitioner does not reside in Indiana, he/she should file in the circuit or superior court of the county where the offender is employed the greatest time. If he/she does not reside or work in Indiana but is a student in the state he/she is to petition the court in the county in which he/she is a student. Only if he/she does not reside, work or go to school in Indiana is a Petitioner to file his/her petition in the county in which he/she was most recently convicted of a crime listed in section five of the this chapter.
- Clearly, Brogan was entitled to have his name removed from the Sex Offender Registry, but under the provisions of the statute, Brogan should have filed in the county of his residence.
- The Court of Appeals held that Noble County was not the appropriate forum in which Brogan could obtain judicial relief directing registry officials to remove his name from the State's Sex Offender Registry.
- The appellate court, therefore, affirmed the Noble Superior Court but held further that this decision did not prejudice Brogan from seeking relief under I.C. 11-8-8-22 in the appropriate county.

Clampitt v. State, 928 N.E.2d 210 (Ind. Ct. App. 5/24/10) PROCEDURE FOR FILING REQUEST TO REMOVE SEXUALLY VIOLENT PREDATOR DESIGNATION FROM SEX OFFENDER REGISTRY

- Clampitt appealed the trial court's denial of his motion to remove his sexually violent predator status from the Indiana Sex Offender Registry.
- The Defendant claimed that application of the current sexually violent predator statute was an *ex post facto* law as applied to him and that he was denied due process when he was categorized a sexually violent predator. Clampitt was convicted in 1995 of Child Molest and Sexual Misconduct With a Minor. He

remained incarcerated on those convictions at the time he petitioned for the relief sought.

- Clampitt argued that although he was not determined a sexually violent predator at his original sentencing hearing, the Department of Correction thereafter categorized him as a sexually violent predator without prior notice or hearing and without authority under the sexually violent predator statute.
- From the record presented on appeal, the Court of Appeals was unable to address the Defendant's claim.
- This opinion reviews in detail the 2010 amendments to I.C. 11-8-8-22.
- The appellate court affirmed the trial court's denial of the Defendant's petition, but directed Clampitt to file a petition in the proper county pursuant I.C. 11-8-8-22, as amended.

Wiggins v. State, 928 N.E.2d 837 (Ind. Ct. App. 5/24/10) PROCEDURE FOR FILING REQUEST FOR REMOVAL OF VIOLENT SEXUAL OFFENDER DESIGNATION FROM SEX OFFENDER REGISTRY

- In this appeal, the Defendant claimed that the Department of Correction, not the Court at sentencing hearing, had determined him to be a sexually violent predator.
- The Court of Appeals noted that I.C. 11-8-8-22 as amended allows the trial court and the appellate court to be fully informed of a sex offender's circumstances and provides that all interested parties be given notice of the filing of a petition to remove a sexually violent predator designation.
- The Court of Appeals affirmed the trial court's denial of the Defendant's petition and directed Wiggins to file his petition in the proper county pursuant to I.C. 11-8-8-22. The appellate court further directed that the court in which the petition was subsequently filed was to then consider the Defendant's petition in light of the provisions of I.C. 11-8-8-22.

ALTERNATE MISDEMEANOR SENTENCING

Fox v. State, 916 N.E.2d 708 (Ind. Ct. App. 11/16/09) DENIAL OF ALTERNATE MISDEMEANOR SENTENCING

- Fox appealed the denial of his request for alternate misdemeanor sentencing.
- I.C. 35-50-2-7(b) requires that a sentencing court explain why it grants alternate misdemeanor sentencing, but does not require that the court explain why did not grant a defendant's request when that request is denied.
- Neither is a court required to find or balance aggravating or mitigating factors when deciding whether to grant a request for alternate misdemeanor sentence, the Court said.
- The Court of Appeals declined Fox's invitation to review the trial court's finding and balancing of aggravating and mitigating circumstances. The appellate court found no abuse of discretion in the trial court's denial of the Defendant's request for alternate misdemeanor sentence.

Gardner v. State, 928 N.E.2d 194 (Ind. Sup. Ct. 4/30/10) EFFECT OF ENTRY OF ALTERNATE MISDEMEANOR SENTENCE IN LATER DETERMINING WHETHER A PRIOR FELONY CONVICTION EXISTS

- In this case of first impression, the Supreme Court was asked to determine whether a prior Class D Felony conviction upon which judgment was later entered as a Class A Misdemeanor prevents a subsequent court from modifying a sentence below the statutory minimum on grounds that the Defendant had a prior unrelated felony conviction.
- I.C. 35-50-2 provides that a trial court may suspend any part of a sentence for a felony except as provided by statute. The exception at issue in the present case was a sentence suspension below the minimum 20 years. The applicable statute provides that a court may suspend only that part of a sentence that is in excess of the minimum sentence when the crime committed was a Class A or Class B Felony and the person has a prior unrelated felony conviction.
- I.C. 35-50-2-7(b) provides that “if a person has committed a Class D Felony, the court may enter judgment of conviction as a Class A Misdemeanor and sentence accordingly.”
- I.C. 35-38-1-1.5 provides that “A court may enter judgment of conviction as a Class D Felony with the express provision that the conviction will be converted to a Class A Misdemeanor within three years if the person fulfills certain conditions.”
- In the present case, the trial court modified the Defendant’s Class D Felony to a Class A Misdemeanor under the provisions of her plea agreement.
- Regardless of the mechanism, the Supreme Court held that entry of judgment as a Class A Misdemeanor constitutes a new and different judgment effectively vacating the prior felony judgment.
- As a consequence, by the time Gardner filed her petition for sentence modification her felony conviction was a matter of the past. So, to the extent that the current sentencing court assumed that it could not grant the Defendant’s request that the court modify the Defendant’s sentence below the statutory minimum, the court erred. The Supreme Court further stated, however, that it could not say that the trial court abused its discretion in declining to suspend the Defendant’s sentence below twenty years.
- The case was remanded to the trial court for further consideration consistent with the Supreme Court’s opinion.

VIOLETIONS OF PROBATION OR COMMUNITY CORRECTIONS

Holmes v. State, 923 N.E.2d 479 (Ind. Ct. App. 3/25/10) USE OF URINE DRUG SCREEN TO SUPPORT ALLEGED VIOLATION OF PROBATION OR COMMUNITY CORRECTIONS

- At issue in this appeal was the sufficiency of the evidence presented in support of revocation of the Defendant’s Community Corrections – Home Detention Placement.

- In particular, Holmes challenged the admissibility of a urinalysis report and claimed that the evidence presented at his change of placement hearing was insufficient to prove that he consumed alcohol.
- The Court of Appeals reiterated that a court is to treat a petition to revoke placement in a Community Corrections Program in the same manner as it treats a petition to modify or revoke probation.
- In general, therefore, the Indiana Rules of Evidence do not apply in a Community Corrections placement revocation hearing.
- In a violation of probation or Community Correction placement revocation hearing, the judge may consider any relevant evidence bearing some substantial indicia of reliability. This includes reliable hearsay.
- In the present case, Holmes argued that the urinalysis report admitted during his revocation hearing was unreliable because neither the toxicologist nor the certifying scientist testified during that hearing.
- In *Reyes v. State* (2007) the Indiana Supreme adopted the “substantial trustworthiness test” as the test to be utilized in determining whether hearsay evidence should be admitted in a revocation hearing. This test requires that the trial court evaluate the reliability of the hearsay evidence proffered.
- In the present case, a toxicologist from AIT Labs affirmed under penalties of perjury that Holmes urine sample was received under sealed controlled conditions and was properly identified. The certifying scientist affirmed that the Defendant’s urine sample was handled and analyzed in accord with all applicable requirements.
- Based upon these representations, the trial court found these affirmations to be of substantial trustworthiness. The Court of Appeals agreed.
- The Court of Appeals held that the trial court in the present case did not abuse its discretion when it admitted the urinalysis reports admitted at the Defendant’s revocation hearing.

CREDIT-TIME DISPUTES

Department of Correction v. Haley, 928 N.E.2d 840 (Ind. Ct. App. 6/9/10)

EDUCATIONAL CREDIT TIME

- While incarcerated at the Indiana Department of Correction, Haley completed the life-skills program entitled “Thinking for a Change.”
- When the IDOC denied the Defendant’s request for educational time credit for completion of that course, Haley filed a motion in the Newton Superior Court under his original criminal cause number seeking a court order that he be given the credit time he sought. The IDOC was not served with a copy of Haley’s motion.
- A special prosecutor appeared for hearing on the Defendant’s motion. The IDOC did not appear.
- After hearing, the trial court granted Haley’s request that he be given six months educational credit time toward his sentence.

- Subsequently, the trial court granted the Attorney General's request to intervene on behalf of the IDOC, but denied the Attorney General's Motion to Correct Error.
- Grants of educational credit time are governed by I.C. 35-50-6-3.3.
- The source of the parties' dispute in the present appeal lies in their respective interpretations of I.C. 35-50-6-3.3(b)(3)(C), namely "What constitutes an acceptable course of study that fulfills the 'literacy and basic life skills program requirement for educational credit time?'"
- The parties agreed that "Thinking for a Change" satisfies the basic life skills component of the statute, but did not agree regarding its satisfaction of the literacy component of the educational credit time statute.
- The Defendant argued that his Bachelor's Degree satisfied the literacy component of the statute and the trial court agreed.
- It was the IDOC's position that the literacy component is satisfied by the adult basic education programs offered in their facilities.
- The Court of Appeals could not say that the IDOC's interpretation of the literacy component of the statute was inconsistent with the language of the credit time statute.
- The Court of Appeals held that the trial court erred in granting Haley's motion for education credit based on his completion of a literacy and life skills program.
- NOTE: the Court also determined that the action brought by Haley was a dispute between an inmate and the IDOC, and that a dispute as to whether an inmate is entitled to credit time is not a criminal action. The Court noted that I.C. 4-6-1-6 and 4-6-1 confer upon the Attorney General the authority to represent the IDOC is such an action. A prosecuting attorney is not authorized by statute to represent the IDOC.
- The trial court's denial of the IDOC's motion to correct error was reversed.

Murphy v. State, ____ N.E.2d ____ (Ind. Ct. App. 7/23/10) (No. 18A02-1002-CR213)
 EDUCATIONAL CREDIT TIME EARNED WHILE INCARCERATED AWAITING TRIAL

- At his sentencing hearing, the Defendant asked the trial court to grant him six months educational time credit in that he had received his GED while incarcerated awaiting trial.
- I.C. 35-50-6-3.3 governs educational credit time.
- The Court of Appeals concluded that it is the trial court that initially determines a Defendant's sentence and in doing so determines the credit time to which a Defendant is entitled as of his/her sentencing date.
- The Court of Appeals determined that the trial court is in a better position than the Indiana Department of Correction to determine whether education credit time should be granted for a degree earned prior to sentencing.
- Defendant's cause was reversed and remanded for further consideration by the trial court.

POST-CONVICTION RELIEF PROCEEDINGS

State v. Damron, 915 N.E.2d 189 (Ind. Ct. App. 10/19/09), *reh'g* denied (12/5/09), *trans. denied* (3/4/10) TAPE RECORDING OF GUILTY PLEA HEARING LOST

- In his post-conviction relief petition, Damron alleged that his plea was not knowing, voluntary, and intelligent because the trial court did not keep a record of that guilty plea hearing.
- The Defendant testified that he pled guilty, but did not remember the particulars of the guilty plea hearing. Both trial counsel and the judge who took the Defendant's plea stated in their respective affidavits that they did not recall this particular guilty plea hearing. The court reporter who recorded the Defendant's plea said in her affidavit that she had searched, but that tapes of the Defendant's plea hearing had been destroyed after ten years and she was, therefore, unable to prepare a transcript of the plea hearing in the Defendant's case.
- The post-conviction court granted the Defendant's petition for post-conviction relief. The State appealed.
- Damron argued on appeal that the destruction of the tape of his guilty plea hearing prevented meaningful review of his 1991 plea.
- In *Boykin v. Alabama* (U.S. Sup. Ct.) (1969) the United States Supreme Court made clear that courts cannot presume a waiver of a defendant's constitutional rights from a silent record.
- The Indiana Supreme Court held in *Hall v. State* (2006) that a lost record is not the *per se* equivalent of a silent record.
- The rule on retention of records requires that when a transcript has not been prepared and filed in a criminal proceeding, the electronic recording of all oral matters together with a log denoting the individuals recorded and meter location of crucial events, shall be maintained as a court record for ten years in all misdemeanor and for fifty-five years in all felony cases.
- The issue for the Court of Appeals' review in the present case was whether the premature destruction of a tape of a guilty plea hearing by court staff rendered the record silent for purposes of *Boykin*.
- The Court of Appeals held that it did not.
- To establish that his guilty plea was unknowing and involuntary, Damron was required to prove by a preponderance of the evidence that he was not informed of his *Boykin* rights. Damron did not carry his burden of proof.
- Because he could not demonstrate that he was entitled to post-conviction relief, the post-conviction court improperly granted Damron's petition.
- The Court concluded that it defies logic to presume from the mere unavailability of a transcript that a defendant was not advised of his rights at his plea hearing.

MISCELLANEOUS

Northwest Towing & Recovery v. State, 919 N.E.2d 601 (Ind. Ct. App. 1/11/10)

STORAGE FEES

- The Muncie Police Department directed that a vehicle be towed and stored at Northwest Towing & Recovery following a deadly traffic crash that ultimately resulted in a criminal conviction of the driver of that vehicle.
- The vehicle's owner who was not a party to the criminal proceedings against the driver, requested the return of the vehicle and Northwest sought to recover its unpaid storage fees in excess of \$3,600.
- Northwest subsequently appealed the denial of its motion to correct error after the trial court limited Northwest's storage-fee lien against the owner of the vehicle to \$1,500 in accordance with I.C. 32-33-10-5(b).
- The Court of Appeals affirmed the trial court's order that the vehicle owner pay Northwest's storage fees in an amount not to exceed \$1,500.00.

Indiana Bureau of Motor Vehicles v. McNeil, ____ N.E.2d ____ (Ind. Ct. App. 8/5/10)
(No. 02A03-1001-MI90)

- The Bureau of Motor Vehicles appealed the trial court's interpretation of I.C. 34-11-2-4(3) which the trial court said imposed a statute of limitations on the BMV's ability to impose an administrative suspension.
- Upon the Defendant's June 14, 2006 conviction, the Allen County Clerk on June 15, 2006, sent an SR-16 to the BMV. McNeil had a prior conviction for OVWI and a conviction of reckless driving within the ten years immediately preceding imposition of sentence on June 14, 2006, thus qualifying him as an habitual traffic violator.
- Two years later, on June 17, 2008, the BMV determined McNeil to be an habitual traffic offender and sent him notification of its HTV determination. The Bureau and further advised McNeil on June 17, 2008, that his driver's license would be suspended for ten years effective July 22, 2008.
- The Defendant filed a Petition for Judicial Review of his Habitual Traffic Violator status.
- The court that heard the Defendant's petition for judicial review issued an order in which it concluded that the two year statute of limitations set forth in I.C. 34-11-2-4(3) applied in the present case and that the passage of more than two years from accrual of the cause of action to notice of suspension barred the BMV from suspending the Defendant's driver's license.
- The trial court ordered the BMV to reinstate McNeils' license and the BMV appealed.
- I.C. 34-11-2-4 provides that "[a]n action for (1) injury to person or character; (2) injury to personal property; or (3) a forfeiture of penalty given by statute, must be commenced within two years after the cause of action accrues."
- The Court of Appeals concluded that determination of an habitual traffic violator status and that suspension of one's driving privileges by the BMV is not an action

for “a forfeiture of penalty given by statute” and the two year statute of limitations did not apply in the present circumstance.

- The trial court’s order to reinstate the Defendant’s driver’s license was reversed.

APPELLATE REVIEW 7(B)

Akard v. State, 928 N.E.2d 623 (Ind. Ct. App. 6/10/10) BE CAREFUL
WHAT YOU ASK

- Akard appealed his ten convictions and corresponding sentences. The Defendant contended on appeal that his sentence of ninety-three years was inappropriate.
- Akard asked the Court of Appeals to review his aggregate sentence and order that his sentences run concurrently thereby decreasing his aggregate sentence from ninety-three to forty years.
- In performing the requested Appellate Rule 7(B) review, the Court of Appeals agreed with the Defendant that his sentence was inappropriate but found further that the sentence imposed was not long enough.
- The Court of Appeals revised the Defendant’s sentence upward to 118 years.
- By requesting 7(B) review, Akard presented to the appellate court the opportunity to revise his sentence by increasing or reducing it.
- The only constraint under 7(B) is that any revision of a defendant’s sentence must be within the legal sentencing range set by the legislature.